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Personal Values and Professional Ethics

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PERSONAL VALUES AND PROFESSIONAL ETHICS[1]

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My purpose on this occasion is to urge reexamination of personal values as a fundamental resource of professional ethics. The essential point is that rules of ethics, such as those embodied in the profession's ethical codes, are insufficient guides to making the choices of action that a professional must make in practice. I will suggest that the same is true of professional tradition and conventional ways of practice. This is not to say that rules of ethics and traditions are irrelevant. Rules of professional ethics frame the ethical problems that are encountered in a lawyer's life throughout practice. Moreover, professional tradition provides an idealized portrait of a professional that serves as a model for action in real world situations. However, framing an ethical problem is one thing, resolving such a problem is something else. Oliver Wendell Holmes remarked about the judicial function that "[g]eneral propositions do not decide concrete cases."[3] The same point supports ethical choices that must be made by lawyers in conducting their practice.[4] So also an idealized conception of what a professional should be, as portrayed in professional tradition, does not determine what a professional should do in the nonideal world of actual practice.

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[3] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[4] In my view, the same is true of moral dilemmas in everyday life. General rules, including rules of law, frame problems of choice among courses of action but are insufficient to resolve such choices as to yield decision regarding a specific course of action that should be followed. Hence, the problem of ethical choice in professional practice is simply a special case of similar problems in everyday existence and all walks of life.

I. PROFESSIONAL ETHICS

The term "professional ethics" can be understood to refer to at least three different but related normative sources: first, the profession's rules of ethics; second, ethical tradition including professional myths, lore and narrative; and, third, the standards of conduct that an observing anthropologist would describe as the profession's conventions of actual practice. The last source may also be captured by the term "habit" which at one time was used to describe a group's regular pattern of conduct. The term "professional" simply denotes that these normative sources function within a specific subgroup in society, in our case the American legal profession.

II. RULES, TRADITIONS AND PRACTICE

The rules of ethics of the American legal profession are constituted in the Rules of Professional Conduct, previously in the Code of Professional Responsibility and before that in the American Bar Association Canons of Professional Ethics. Various subsections of these codes incorporate rules of general law that govern the citizenry at large. For example, the profession's ethical codes require a lawyer to refrain from violating the general criminal law and from committing civil fraud in his own conduct.[5] The codes also permit a lawyer to use the process of the courts only for lawful purposes.[6]

Our professional tradition is another source of ethical guidance. That tradition includes such articles of faith as "equal justice under law," "a lawyer knows no duty other than to his client," "every client with a just cause has a right to a lawyer's assistance," and "due process of law is a fundamental right."[7] In contemporary discourse about the legal profession, the profession's

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[5] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(d) (1983) [hereinafter RPC].

[6] *Id.* Rule 3.1.

[7] Many of these articles of faith are expressed in the Ethical Considerations of the Code of Professional Responsibility. *See, e.g.*, RPC, *supra* note 5, EC 2-25 (1981) ("The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer...."); *Id.* EC 227 ("Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."); *Id.* EC 51 ("Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."); *Id.* EC 736 ("Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.").

espoused tradition or mythology (I use the term in the anthropological sense) is often referred to as its narrative.[8]

The legal profession's practice conventions or "habits" - its ways of actually doing things as observable by an anthropologist - are what we learn after we get out of law school. One example is the practice of using a form book whenever possible even when the specific form is not completely appropriate to the task. A legal form embodies precedent and precedent usually produces better results for a busy practitioner, rather than thinking a problem through de novo. Another professional "habit" consists of putting off any less urgent matter in favor of a more urgent matter. In general, this is a sensible scheduling principle in our work, which mostly consists of dealing with one emergency after another. However, in practice this habit often translates into doing all tasks at the last minute.

The relationship among these normative sources - rules, traditions and "habits of practice" is dynamic and complex. Lawyers are ever mindful of the central principles in the rules of ethics even if most lawyers do not know the letter of the ethical codes, let alone follow the rules to the letter. Our profession's traditions hover in the back of every lawyer's mind, helping us to interpret, justify and give higher meaning to our work. The idealized conception of the lawyer's vocation is that we are in the service of justice and the protection of the oppressed, including oppressed corporate clients. Without such an idealization the work often would be too tedious and frustrating.

The habits of lawyers' work, as observed by an anthropologist, tend to contradict the idealized version expressed in professional narrative. Moreover, some conventions of practice violate the rules prescribed in the ethical codes.[9] Lawyers violate the rules and fail to fulfill their own professional ideals because, like everyone else, they are subject to the constraints of economics, politics and human frailty. The contradiction between the ideal and the legal, on the one hand, and actual practice, on the other, does not prove that lawyers are indifferent to their ethical obligations. It proves only that practicing law according to the rules, let alone according to idealization, is not easy.

III. OBJECTIVITY AND SUBJECTIVITY

Practice as it is actually performed is an outward and observable activity that is guided by inner and invisible norms. These norms are given expression in our codes and the traditions about our profession. The codes are promulgated as public law. The traditions are transmitted by recitations, for example, in the form of stories about lawyers such as *Anatomy of a Murder* and *To Kill a*

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[8] *See* Robert M. Cover, *The Supreme Court 1982 Term - Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991).

[9] *See* Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).

Mockingbird.[10] We also hold periodic recitations in the form of bar association speeches and of lectures given to law students by professional elders. In these forms the codes and traditions take on shared meaning.

Because the rules of professional ethics and professional narratives can be shared in this way, they are "objective" in an important sense. The rules are objective in the same sense that all legal rules are objective in an important way. The professional narratives similarly convey a commonly understood meaning within the legal community. Thus, "we" lawyers are able to say such things to each other as "during cross examination, never ask a question unless you already know the answer," and "there is nothing as insecure as an unsecured creditor."

The codes and the narratives are objective in the further sense that they refer to patterns of conduct that can be observed and proved through evidence. For example, the rules prohibiting conflict of interest refer to specific observable situations where a lawyer has more than one client.[11] Accordingly, it is possible to observe in a specific case whether a lawyer in fact has more than one client and whether the relationships are such that there is an adverse interest among the clients as defined in the rules.[12] For further example, the rules requiring that a fee be reasonable refer to the legal services market as a standard of reasonableness.[13] It is possible to observe in a specific case whether the fee meets this standard.[14] Again, the rules requiring candor to the court make a comparison between facts that the lawyer may be inferred to know and the account of such facts that the lawyer has given to the tribunal.[15]

The same is true, in a less rigorous sense, of professional tradition. A narrative or tradition is a story shared among a group in terms of which the group defines its place in the world and proclaims its identity to itself and others. We tell these stories to make vivid in our minds the ways we are supposed to act. Thus, the tradition that a lawyer knows no duty other than to his client is the counterpart of the rule that a lawyer must avoid impermissible conflicts of interest. The image projected in such a story can then be compared to practice in a real world situation. Professional narratives, myths, ideals - call them what we will - are media of interpersonal communication. In this sense they too are objective like the codes or rules.

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[10] *See generally* THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS (1987).

[11] RPC, *supra* note 5, Rule 1.7.

[12] *See* Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978).

[13] RPC, *supra* note 5, Rule 1.5.

[14] *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 46 (Tentative Draft No. 4 1991).

[15] *See generally* RPC, *supra* note 5, Rule 3.3(a)(1).

And, of course, actual practice is objective in the sense that it can be observed, described and compared with other kinds of activity. To be sure, the help of an external observer is often necessary to see what a group actually does as distinct from what it professes to do. However, the most acute observers of law practice are those newly admitted young lawyers who are learning their trade. No learning curve is as steep as that in the first few months of practice. Every beginning lawyer is something of an on-the-job anthropologist. As Yogi Berra has said, "You can observe a lot by watching."

But what is going on in the minds of the people who engage in this thing called the practice of law?

IV. THE LAWYER'S SUBJECTIVE WORLD

From the outside, a lawyer's thoughts, her state of mind at any given moment, cannot be observed. The observer can only make inferences, perhaps nothing more than guesses, about the mental pathway by which a lawyer gets from dilemma to resolution every day and every moment of actual practice. That pathway runs through the realm of the individual lawyer's subjective reality. The pathway actually chosen is not revealed to others except through circumstantial evidence. It is the silent world of personal consciousness. Yet this is the world in which each of us as lawyers must make decisions about what to do in concrete situations encountered in practice. This is the realm that I now want to address.

Lawyers do many different kinds of things. Most of these tasks are variations of three basic functions: first, interviewing and giving advice to clients; second, negotiating contracts, settlements and other arrangements with third parties; and third, presenting evidence and legal argument before the courts. In each of these tasks the lawyer confronts an external reality, consisting of the client, the opposing parties, the court, and the world at large. But the lawyer experiences this world through the process of her own consciousness.

It is through the lawyer's own consciousness that all the relevant variables come into view and proceed into motion. Although law practice starts with having a client, a person who enters the lawyer's immediate environment becomes a "client" only through the lawyer's awareness and interpretation.[16] Law practice involves encounters with other third parties such as opposing parties in litigation and in negotiation. Such a person is identified as friend or foe in litigation or negotiation only through the lawyer's interpretation of that party's interests.[17] It is familiar lore that parties formally aligned on opposite sides of litigation may have essential common interests. It also holds true that parties formally on the same side may have fundamentally conflicting interests.

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[16] *See* GEOFFREY C. HAZARD, JR. & SUSAN KONIAK, THE LAW AND ETHICS OF LAWYERING ch. IX (1990); *see, e.g.*, Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979).

[17] *See, e.g.*, Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977).

Similar awareness and interpretation is required in determining the strategy and tactics to be followed in carrying out a representation. It is a familiar rule of ethics that a lawyer may not offer false evidence such as perjured testimony.[18] How does a lawyer go about determining whether a specific item of evidence falls within this prohibited category?[19] Awareness and interpretation is required in order to apply this rule. It is an equally familiar rule that a lawyer may offer evidence whose authenticity is dubious.[20] But how does a lawyer arrive at the conclusion that a specific item of evidence is merely dubious rather than fabricated? Whatever conclusion is reached in this respect, how does a lawyer decide whether it would be strategically imprudent to offer evidence that is not fabricated but which is dubious? There is lawyers' lore, not to be disregarded, that a jury might think that dubious evidence is fabrication, and infer from that the same is true of the case as a whole.

I will give another case, a true war story. A lawyer represented the seller of real property under a contract that required the seller to disclose all adverse facts known to the seller but which otherwise imposed on the buyer the burden of *caveat emptor*. In the course of representing another client in an unrelated matter, the lawyer discovered a serious legal impediment to the development of the property that very likely would abort the deal if the fact was made known to the buyer. The lawyer therefore confronted the following question: Should she apprise her client (the seller) of this impediment, thus putting the seller under the obligation to transmit the information to the buyer? Or should the lawyer treat the information as a matter not to be revealed to the client? Nondisclosure would subject the client to the risk that the transaction, if allowed to go forward, could later be attacked on the ground of mutual mistake or perhaps fraud. Six million dollars in damages for the client and a possible malpractice suit for the lawyer could turn on the lawyer's pathway of thought in resolving that dilemma.

The point to be made through these anecdotes is that the precise knowledge upon which the lawyer must proceed is known only to the lawyer. This is because the lawyer's private knowledge is by necessity the lawyer's personal, subjective awareness and intepretation of the situation before him. The lawyer cannot seek a declaratory ruling from the court as to what the facts are and what ethical judgment should be made in light of the facts. Shortage of time and urgency of circumstances will not permit the lawyer to obtain such authoritative determination of reality. Indeed shortage of time and urgency of circumstances may not even permit consultation with a colleague, or seeking an answer from an ethics committee or a bar association "hot line." Solo practitioners usually have to resolve these problems without anyone to consult, and law firm lawyers often must proceed in the same isolation. Even a lawyer

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[18] *See* RPC, *supra* note 5, Rule 3.3(a)(4).

[19] *See, e.g.*, United States v. Long, 857 F.2d 436 (8th Cir. 1988).

[20] *Contra* RPC *supra* note 5, Rule 3.3(a)(4).

who has taken consultation ultimately has to make a personal decision as to what to do.[21]

V. PERSONAL VALUES IN PROFESSIONAL ETHICS

It is in this lonely subjective world that a lawyer is required to "call the shots" in ethical dilemmas. In this lonely world the rules of ethics usually appear as merely vacuous generalizations. The rules say that evidence may not be offered if the lawyer knows it is fabricated, but of what avail is that guidance? The rules do not and cannot say whether specific evidence is fabricated. A court may eventually make a finding on the issue one way or another, but such a finding will be long after the event and even then the court might be wrong. Before that event comes about the lawyer has to resolve the question through irreversible action by deciding whether to use the evidence. Similarly, the rules say that nondisclosure of a material fact in a financial transaction may constitute fraud, but so what? The rules do not and cannot say whether a specific financial datum is material or even whether it is a fact. Perhaps the datum is merely the figment of some anxious accountant's hypercautiousness.[22] Perhaps, however, it is a fact. The lawyer has to resolve the question, sometimes in an instant.

How does a lawyer decide such issues? None of our standard professional techniques are of much help in such situations. Professional technique in the interpretation of rules would permit us to determine whether the rules prohibit introduction of fabricated evidence in litigation or require disclosure of material facts in a transaction. The difficult ethical problem in such cases is not, however, what the rule says but whether the factual conditions have arisen that call the rule into operation. The technique for interpreting the rules therefore has no application unless merely for the purpose of reaching the self-deceptive conclusion that the rule does not mean what it says. Professional technique in the proof of facts would enable us to make an evidentiary showing to someone else as to whether the evidence is fabricated or whether the facts are material. But the professional techniques for proving facts to others are insufficient for the purpose of deciding facts for ourselves. Surely it is nonsense to speak of establishing a prima facie case to one's self.

Likewise, professional narrative and tradition do not provide means of resolving issues of this kind. Professional narrative speaks in terms of concrete cases, not in the abstract generalizations of the ethical codes. However, the concrete cases incorporated in professional tradition are either historical or apocryphal. Either way, they do not replicate the concrete case that the lawyer must resolve. An example is the story of Abe Lincoln's successful use of the Farmer's Almanac to demolish the testimony of a lying witness. Such a concrete

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[21] *Cf.* RPC, *supra* note 5, Rule 5.2(b) (allowing a junior lawyer to rely on a senior's determination of an ethical issue if the matter is "reasonably arguable").

[22] *See* SEC v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978).

case presents a model for action in a present ethical dilemma, but only if the facts of the present dilemma correspond to those in the model case. If there are differences in the facts, the model indeed can be misleading. For example, a lawyer who supposes that his only duty is to his client is in for an unpleasant surprise if the client is seeking help in concealing the evidence of a crime.[23]

The limited utility of professional narrative resembles the limited utility of the case method of judicial reasoning. A prior case that is on point may indeed be a binding authority. However, it is always an open question whether a prior case is on point. A prior decision becomes binding when we conclude that it is on point, but there is nothing about a prior decision that binds us to first test the prior case on point.

Conventions of practice have similar limited utility in the lawyer's subject realm. Studying what lawyers do in their practice does not tell us what is going on in their minds. As to that we can only make educated guesses. Indeed, on this matter Yogi Berra may have further wisdom from which we can benefit. He said that "You can't think and hit at the same time." A successful batter is in some sense unconscious in the moment of choice when he swings the bat. I also believe that a lawyer is in some sense unconscious in the moment of choice when he resolves an ethical dilemma.

In the literature of professional ethics, remarkably little attention is given to this matter. The rules of professional ethics differentiate various states of mind as the predicates of various kinds of ethical decisions. Thus, the rules differentiate between "believing," "knowing" and "reasonably believing."[24] However, these rules are designed to guide decision-makers such as grievance committees in resolving issues of circumstantial evidence as to a particular lawyer's state of mind on a particular occasion. By extension, these rules also tell a lawyer how a tribunal may be inclined to assess the lawyer's conduct after the fact. At most, therefore, these rules inform the lawyer how others in the future will think about what the lawyer is now thinking. The rules governing others in assessing a lawyer's state of mind do not provide insight to the lawyer about his own state of mind.

VI. CONCLUSION

There is of course more to be said on this problem. When all has been said, however, the fact will remain that a lawyer's ethical deliberations are a process of personal thought and action. That process is guided by the rules of the ethical codes, by professional tradition, and by prevailing standards of practice. According to these normative sources, a lawyer in litigation is well advised not to offer in evidence material that the lawyer thinks is fabricated and that he should know would be found to be so by a moderately sensible trier of fact. Similarly, a lawyer in a transaction is well advised to make disclosure of a fact

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[23] *See, e.g.*, Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985).

[24] *See* RPC, *supra* note 5, Terminology.

that the lawyer thinks is material and which he should know would be found to be so by a moderately sensible trier of fact.

The practical judgments necessary to these tasks are essentially the same as those made by people in ordinary life. They are personal judgments. As such, they incorporate an unavoidable element of personal value, just as an element of value is incorporated in how we treat our friends, members of our family, professional colleagues, rivals, and the people who live across the street. Thus, it is not true - no matter what they say - that in becoming a lawyer one ceases to be a person.

The question remains of what kind of person one wants to be.